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August 18, 2003

Utah Attorney General's Opinion No. 03-001

Governor Michael O. Leavitt
Governor's Office
210 State Capitol
Salt Lake City, UT 84114-0000

Re: Opinion Request on Gubernatorial Succession

Dear Governor Leavitt:

This letter responds to your request for legal guidance on the question whether the Lieutenant Governor, upon the resignation of the Governor, succeeds to the Office of Governor or whether she becomes an "acting" Governor. Based upon the provisions of [Article VII, § 11](#) of the Utah Constitution, the history of the adoption of that section and its amendment in 1980, case law and actions in other states (there being no Utah case on point), and the efficient operation of government, it is my conclusion that upon resignation of the Governor, the Lieutenant Governor succeeds to that office, and becomes the Governor.

Upon its adoption, the Utah Constitution provided that in the case of the resignation of the Governor the "powers and duties of the Governor shall devolve upon the Lieutenant Governor." [Article VII, § 11](#). That language followed the provisions in the [United States Constitution, Article II, § 1\(6\)](#), that in the event of the removal of the President, his death, resignation, or inability to discharge the powers and duties of the office that "the same shall devolve to the Vice President." The federal experience under that language was that the Vice President succeeded to the office of, and became, the President. This succession occurred four times prior to the adoption of Utah's Constitution – John Tyler in 1840, Millard Fillmore in 1850, Andrew Johnson in 1765, and Chester Arthur in 1881. Therefore, at the time of the adoption of the Utah Constitution, it was understood, in theory and in practice, that the Constitutional language "shall devolve" meant "succession" such that the Lieutenant Governor would become the Governor.

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Utah's succession provision was revisited in 1980 when the citizens of the State of Utah adopted amendments revising the Executive Article. Among other changes, the revision created the Office of Lieutenant Governor in place of the Secretary of State, required the candidates for Governor and Lieutenant Governor to run on the same ticket, clarified the line of succession of executive authority, and a procedure to determine gubernatorial disability while providing continuity in government. See Senate Joint Resolution 7, passed March 8, 1979 and adopted in November, 1980. Included with the information provided to the electorate in the Voter Information Pamphlet in 1980, when they adopted the amendments, was the impartial analysis by the Legislative Research Director Jon Memmott and arguments in favor of the Executive Article revision by proponent senators Karl N. Snow and Fred W. Finlayson. The impartial analysis noted that candidates for the Office of Lieutenant Governor and Governor run on the same

ticket “as in the case with the candidates for the office of President and Vice President of the United States.” The arguments in favor of the revision also noted that “the proposed amendment clarifies the present order of succession, making it similar to that of the U.S. Constitution.” Thus, the electorate were told that the creation of the Office of Lieutenant Governor and the succession provisions were similar to, and modeled on, the federal system. In addition to the long history of succession to President by Vice Presidents, the U.S. Constitution had been amended by that time that to clarify “in the case of removal of the President from office or of his death or resignation, the Vice President shall become President.” The [United States Constitution, Amendment 25, § 1](#), effective February 23, 1967.

Because the Utah constitutional language that the “powers and duties devolve” came from equivalent federal language where the Vice President succeeded to and became the President, and because the citizens adopted amendments to the Utah Constitution providing for a Lieutenant Governor and a succession “similar to that of the United States Constitution,” the intent of the provisions and the understanding and expectation of the citizens who adopted them, was that succession would be similar to the federal system and that the Lieutenant Governor would succeed to the Office of Governor and become Governor.

This issue has been faced in a number of other states with constitutional language similar to Utah. See *Bryant v. English*, 843 S.W.2d 308 (Arkansas 1992) and *Chadwick v. Earhart*, 4 P. 1180 (Oregon 1884), reaffirmed in *State v. Alcott*, 187 P. 286 (Oregon 1920). In *Bryant*, a case stemming from the resignation of Governor Clinton to become President, the Court in arriving at its conclusion analyzed the language of the Arkansas Constitution, the history of the provisions and the times when it was adopted, the effect on state government of different interpretations, and how the office had been viewed. Arkansas’s constitution, like Utah’s, provided that powers and duties “devolve” to the Lieutenant Governor. The Court also looked to the further Arkansas provision, similar to Utah’s, that upon the vacancy of the Offices of both Governor and

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Lieutenant Governor that the President of the Senate (or in his inability, the Speaker of the House) “shall act as Governor until the vacancy is filled.” (Emphasis added). The Court stated, at page 312:

The difference in language suggests that the Lieutenant Governor, unlike the President (pro tempore) of the Senate or the Speaker of the House, does not merely act as Governor when the Governor resigns. Rather, it suggests that he becomes Governor.

The Court thus held, under the same language as in the Utah Constitution (i.e., that the powers and duties of the Governor “shall devolve upon the Lieutenant Governor for the residue of the term”), that upon resignation of the Governor, the Lieutenant Governor becomes the Governor and is not an “acting Governor.” The similarity of Arkansas’s constitutional provisions and the reasoning of the Arkansas Court is persuasive authority for interpreting the Utah Constitution.

Some other states, under similar (and dissimilar) language have ruled differently – that the successor (either the Lieutenant Governor, Secretary of State or President of the Senate) does not become Governor, but “acts” as Governor. See e.g., *State ex rel. De Concini v. Garby*, 195 P.2d 153 (Arizona 1940). However, I am not persuaded by that other line of cases. Further, most of those are older cases and in most instances the legislatures and citizens amended their constitution after the court decision to clearly provide that the successor does become the Governor. See e.g. Arizona, California, Montana, and Wisconsin. Thus, case law from other states, and specifically the *Bryant* case, as well as the people’s response to contrary decisions, support my determination that under the Utah Constitution upon resignation of the Governor the Lieutenant Governor becomes the Governor.

The specific language of the Utah Constitution does not lead to a contrary conclusion.

As indicated above, the operative language is that upon the resignation “the powers and duties of the Governor shall devolve upon the Lieutenant Governor.” [Article VII § 11, Utah Constitution](#). That specific language and word “devolve” came from the United States Constitution which had long been interpreted to mean that the Vice President succeeded to and became the President upon resignation or death of the President. The alternative claim would be that the Lieutenant Governor becomes the “acting” Governor, exercising the powers and duties of the office, but not assuming the title, nor the power to appoint a Lieutenant Governor. However, the only provisions in the Utah Constitution providing for someone to “act as Governor” under a succession is in the case of a vacancy in the both the Offices of Governor and Lieutenant Governor, where the President of the Senate, or if he/she is unable, the Speaker of the House “shall act as Governor until the vacancy is filled.” [Article VII § 11, Utah Constitution](#). As was noted in Bryant v. English above, different language respecting the Lieutenant Governor and the

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legislative leaders would suggest a different treatment – the Lieutenant Governor, unlike the President of the Senate or Speaker of the House who would “act as Governor,” becomes the Governor.

It is thus my conclusion that upon the resignation of Governor Leavitt, Lieutenant Governor Walker succeeds to and becomes Governor of the State of Utah. Upon her becoming Governor, the Office of Lieutenant Governor becomes vacant and is subject to the Governor’s appointment power under [Article VII, § 10](#), of the Utah Constitution.

A separate question and issue has been raised whether the exercise of that appointment power by the Governor requires Senate confirmation. [Article VII § 10](#) provides that the Governor shall “nominate, and by and with the consent of the Senate, appoint all state and district officers whose offices are established by this Constitution and whose appointment is not otherwise provided for.” However, the appointment of the Lieutenant Governor by the Governor is “otherwise provided for,” as that section further sets forth that if the Office of Lieutenant Governor is vacant “it shall be the duty of the Governor to fill the same by appointment, from the same political party of the removed person; and the appointee shall hold office until a successor shall be elected and qualified, as provided by law.” This provides specific appointment authority, with separate appointment requirements, and thus is an appointment that is “otherwise provided for.” Therefore, Senate confirmation is not necessary.


The conclusion that Senate confirmation is not necessary was similarly reached by the Utah Supreme Court in Matheson v. Ferry, 641 P.2d 674 (Utah 1982). The Court stated, at page 692:

The construction is also consistent with the policy underlying the language in § 10 that the Governor shall fill unexpired vacancies in the major elective State offices, i.e., Lieutenant Governor, State Auditor, State Treasurer, and Attorney General without senatorial confirmation. In such cases, the sole restriction upon the power of the Governor in making the appointment is that the appointee must be from the same party as the party of the person who previously held that office. (Emphasis added).

Thus, when a Lieutenant Governor succeeds to the Office of Governor, the vacated Lieutenant Governor’s Office will need to be filled by the Governor with an appointment in accordance with [Article VII, § 10](#), without the consent of the Senate.

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My conclusion that Lieutenant Governor Walker will become Governor Walker upon



resignation of Governor Leavitt will hopefully end the current questions surrounding this issue and provide for a clear and complete transition. If I can be of further assistance in this matter, or if you have further questions, please contact me.

Sincerely,

MARK L. SHURTLEFF
Utah Attorney General

MLS

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